U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15Nov2002

CASE NO.: 2002-LHC-826

OWCP NO.: 07-152179

IN THE MATTER OF

CHARLES WESTLEY,
Claimant

v.

NORTH AMERICAN FABRICATORS,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN., LTD,
c/o LAMORTE BURNS, INC.,
Carrier

APPEARANCES:

J. KONRAD JACKSON, ESQ.
LESTER J. WALDMANN, ESQ.
On behalf of the Claimant

ANNE KELLER, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Charles Westley (Claimant) against North American Fabricators (Employer) and Signal Mutual Indemnity Assn. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in

Metairie, Louisiana, on July 9, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibits 1-18;
2. Claimant's Exhibits 1-3;and
3. Employer's Exhibits 1-5.[1]

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2002-LHC-00826:

1. Jurisdiction is not a contested issue.

2. Date of injury/accident: January 7, 1999.

3. The injury occurred in the course and scope of employment.

4. An employer/employee relationship existed at the time of the accident.

5. Date Employer advised of injury: January 7, 1999.

6. Date Notice of Controversion filed: March 1, 1999 and July 24, 2000.

7. Date of informal conference: April 26, 2001.

II. ISSUES

The unresolved issues in this proceeding are:

1. Nature and extent of disability.

2. Authorization for change of physician.
3. Average weekly wage.

4. Medical expenses.

[1]Employer's Exhibit 5, submitted post-hearing, is admitted into evidence.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a fifty-two year old man who resides in Houma, Louisiana. (Tr. 9). He has a high school diploma and attended junior college for a few years in California. (Tr. 9-10). After returning to Louisiana, Claimant worked as a truck driver for Acme Truck Line for ten or fifteen years. (Tr. 10-11). By Claimant's estimate, he earned about $500 to $600 per week at that job. (Tr. 11). When the work got slow, Claimant left that job and went to work for Employer sometime in the fall of 1998. (Tr. 12, 47). He started out as a roustabout, making $7.50 an hour. (Tr. 15). He later worked in a tacking crew as a fitter helper and was paid $8.50 an hour. (Tr. 16). Claimant worked between fifty-five and sixty hours a week, including some weekends. (Tr. 16). The employees were not required to work overtime unless they chose to do so. (Tr. 17).

Claimant was working as a tacker when he was injured on January 7, 1999. (Tr. 15-16). He was working with a crew inside a tank on a boat. (Tr. 17). The crew's job was to take some angle irons and scaffolding out of the top of the tanks. (Tr. 17). Claimant was putting boards in the bottom of the tank when he slipped and fell off the scaffolding boards, landing in a split position and twisting his left knee, which hit the bottom of the tank when he fell. (Tr. 17-18, 53-54). It took three or four co-workers to help Claimant out of the tank and take him to the medical office. (Tr. 19). Claimant testified that his knee was swollen at that time. (Tr. 19-20). The medic gave Claimant some pain medication, iced his knee and checked to make sure his leg was not broken. (Tr. 20). Claimant read and signed a form designating Dr. Robert Davis as his choice of physician. (Tr. 21-22). He understood that he was entitled to choose any physician that he wanted to see but that he could choose only one. (Tr. 56-57). He did not know what kind of doctor Dr. Davis was but later learned that Dr. Davis is a general practitioner/family physician. (Tr. 22). Claimant decided not to go to the emergency room and went to see Dr. Davis the following day. (Tr. 20).

Claimant testified that on his first visit with Dr. Davis, the doctor examined his knee, which was severely swollen, and gave him some pain medication and a knee brace. (Tr. 23). Dr. Davis told Claimant to return in eight to ten days. (Tr. 23). When asked why Dr. Davis had noted that there was no swelling or bruising to the knee at that time, Claimant said that was only the doctor's opinion. (Tr. 56). Claimant said that his knee was still swollen when he returned for his second visit, and Dr. Davis gave him some crutches to help with balancing his weight. (Tr. 24). Claimant testified that he used his crutches all the time for the week between his second and third visits. (Tr. 24). He denied telling Dr. Davis that he was not wearing the knee brace that Dr. Davis had recommended. (Tr. 58). Dr. Davis also prescribed physical therapy for Claimant, and Claimant did attend some sessions, although he missed a few appointments as well. (Tr. 26). Claimant said he missed these appointments because his mother was ill and he had to take her to the doctor. (Tr. 61-62). Claimant testified that the physical therapy helped a little but did not decrease his pain. (Tr. 26). He was satisfied with the treatment that he received from Dr. Davis. (Tr. 60).

When Claimant returned for another appointment with Dr. Davis, Dr. Davis referred him to Dr. John Sweeney. (Tr. 24-25). Initially, Claimant was not aware that Dr. Davis was referring him to Dr. Sweeney because Dr. Sweeney was a specialist. (Tr. 59). Claimant later learned that Dr. Sweeney was an orthopedic specialist, but he never signed a form to designate Dr. Sweeney as his treating specialist or told Dr. Davis that he wanted Dr. Sweeney to treat him. (Tr. 25-26). However, he did not have another orthopedist that he would have preferred to see, and he would have followed Dr. Davis' recommendation on that. (Tr. 60).

On his first visit with Dr. Sweeney, Claimant was still using crutches and had a brace on his leg. (Tr. 28). He did not tell the doctor that he was using crutches, but he did tell the physical therapist. (Tr. 59). He denied that Dr. Sweeney "fussed" at him about missing his physical therapy appointments or told him that he would be discharged if he missed another session. (Tr. 28). On the second visit, Dr. Sweeney told Claimant that his knee was completely healed and released him to full duty. (Tr. 27-29). Claimant said that he told Dr. Sweeney at that time that his knee was still hurting and that he was having difficulty bending or kneeling and could not perform his regular duties. (Tr. 29). According to Claimant, Dr. Sweeney did not respond and walked out of the office. (Tr. 29). Claimant was not satisfied with Dr. Sweeney's treatment of him and said that Dr. Sweeney did not treat him like a patient. (Tr. 60). Claimant felt that Dr. Sweeney was minimizing his complaints of pain, but he did not tell Dr. Sweeney that he was uncomfortable with his treatment. (Tr. 60-61). He explained that he never returned to Dr. Sweeney because he did not think the doctor would see him again after having released him. (Tr. 46). Claimant denied that Dr. Sweeney ever told him to return on an as-needed basis. (Tr. 79).

While Claimant was going to see the doctors after his injury, he continued to work for Employer. (Tr. 35). He was repairing tools in a workshop and earning the same amount of pay as he had earned before the accident. (Tr. 35). When Dr. Sweeney released Claimant, he returned to work to see a supervisor on the same day. (Tr. 31). He explained that despite the doctor's opinion, he was not able to perform his full duties and that he wanted to seek a second opinion about his injury. (Tr. 31). However, Claimant acknowledged that he did not know what specific work he would be doing after he was released to full duty. (Tr. 103). He testified that he called work every morning after that to say that he could not come in. (Tr. 31). According to Claimant, the people that he was calling never got his messages about not coming in to work. (Tr. 32). Claimant never asked anyone at work to put him back on light duty, nor was he asked to return to light duty work after he said he was unable to work as a pipefitter. (Tr. 35, 80). Eventually, Claimant received a pink slip in the mail informing him that he had been terminated due to absenteeism. (Tr. 32). Claimant testified that he did not know that he would be fired by Employer if he did not return to work when Dr. Sweeney discharged him on February 23. (Tr. 64). He did not think that he had said otherwise during his deposition. (Tr. 65). He explained that he assumed that he would still be employed as long as he continued to call in each day and say that he was unable to work. (Tr. 66).

After he was fired, Claimant went to see Dr. Richard Meyer, an orthopedic specialist, in March 1999. (Tr. 37). He has continued to treat with Dr. Meyer for the past three years. (Tr. 37). Claimant testified that after his injury occurred, he had undergone an MRI and read the results, which

he obtained before he went to see Dr. Meyer. (Tr. 30). He said that neither Dr. Davis nor Dr. Sweeney provided him with his MRI results, and he denied speaking with someone from Dr. Davis' office about the MRI results. (Tr. 64). In any case, Claimant was concerned because the MRI showed that he had some sort of tear in his knee. (Tr. 30). Claimant told Dr. Meyer that his knee hurt on both sides, although he had told Dr. Davis and Dr. Sweeney that it only hurt on one side. (Tr. 88-89). Based on the MRI and a physical examination of the knee, Dr. Meyer advised Claimant that he should undergo orthoscopic surgery on his knee. (Tr. 37-38). Claimant testified that he wishes to undergo the surgery so that he can live his life as he did before the accident. (Tr. 38). He explained that he never asked Employer to pay for his treatment with Dr. Meyer because he did not think Employer would do so. (Tr. 46).

On cross-examination, Claimant testified that Dr. Meyer's treatment has consisted of giving him exercises to do at home and prescribing medication. (Tr. 68). He said that Dr. Meyer had not prescribed physical therapy because Claimant had told him that he had already had physical therapy. (Tr. 69). Claimant agreed that he might have told Dr. Meyer that he had undergone six weeks of physical therapy, but he did not remember whether he had actually done six weeks or not. (Tr. 63). Claimant agreed that Dr. Meyer told him the purpose of the proposed surgery is to repair ligament damage to his knee but denied that Dr. Meyer said the surgery was to correct an arthritic condition as opposed to a tear in the knee. (Tr. 69).

About three or four months after his discharge by Employer, Claimant began seeking other employment. (Tr. 38). Several months after that, in mid-February 2000, he obtained a job with Delta Inspection. (Tr. 39). He testified that he made $10 an hour and worked forty hours a week at Delta. (Tr. 43). After leaving Delta, Claimant worked for Supreme Services, an oil company, for three or four months. (Tr. 74). He made $9 an hour at that company. (Tr. 74). He later returned to work at Acme for about four or five months. (Tr. 43). Claimant explained that he left Delta because he was not making enough money and he would be paid more at Acme. (Tr. 44). Then Claimant went to work at Terrebonne Consolidated Government, where he made $8.04 an hour. (Tr. 44). Initially, Claimant denied that he felt that he was capable of going back to work as a truck driver immediately after his discharge, despite being confronted with a contrary statement in his deposition. (Tr. 70-71). However, he then agreed that the problem actually was his inability to find that kind of work at the time. (Tr. 71). He testified that he was employed on July 26, 2000, and that if Dr. Meyer had made a note that he was unemployed at that time, the note was incorrect. (Tr. 76-77).

Claimant underwent a pre-employment physical with Dr. Scott Haydel before he began working for Terrebonne Parish. (Tr. 81). He testified that he did not mark any boxes that would indicate that he had a physical limitation due to his knee injury. (Tr. 84). He acknowledged that he considered the possibility that his knee might hamper his driving abilities, but he did not tell Dr. Haydel about it. (Tr. 84-85). Claimant never told Dr. Haydel that he had suffered a previous work-related injury. (Tr. 88). As part of the examination, Dr. Haydel bent Claimant's knee and had him do some squatting. (Tr. 89). Dr. Haydel did not jiggle Claimant's leg or manipulate his knee. (Tr. 90). When the doctor moved Claimant's knee, Claimant declined to mention any pain to him. (Tr. 85). Claimant also did not tell Dr. Haydel that he was taking pain medication at the time. (Tr. 87).

Claimant explained that he withheld this information from Dr. Haydel because he needed the job. (Tr. 90).

Claimant saw Dr. Sweeney again on August 26, 2001, as per Department of Labor orders. (Tr. 77). He and Dr. Sweeney disagreed about whether Claimant's knee was swollen; Claimant said that it was, but Dr. Sweeney said that it was not. (Tr. 86). Claimant told Dr. Sweeney that he limps constantly. (Tr. 87). When told that Dr. Sweeney's report stated that he had not gone to work after the accident, Claimant denied telling Dr. Sweeney such a thing. (Tr. 78). He also did not recollect telling Dr. Meyer in October 2001 that his job with Terrebonne Parish was his first job since the accident. (Tr. 78).

During cross-examination, Claimant testified that he began working for Employer in August or September 1998, but he later stated that it was possible that he started in October or November 1998. (Tr. 47, 96). Before that, he worked for Acme. (Tr. 48). When asked about the discrepancies between his hearing testimony and his deposition testimony on how much he made while at Acme, Claimant explained that his weekly wage varied. (Tr. 48). His income tax return for 1998 showed total earnings of $12,375, and Claimant testified that this amount was his entire income for the year. (Tr. 48-49). This amount represented continuous employment for three-quarters of 1998 with Acme and one-quarter with Employer. (Tr. 49). Claimant did not think that he had insurance benefits when he worked for Employer. (Tr. 51). He testified that he has two children but did not claim them as dependents on his 1998 and 1999 tax returns. (Tr. 51-52). However, he did claim some other children on his tax returns instead, although none of these three children lived with him. (Tr. 52). He explained that he supported these children by giving them a portion of the refund on his tax return, although he did not provide support for them during the tax years in question. (Tr. 53). Despite discrepancies with his deposition testimony about how he hurt his knee, Claimant testified at the hearing that he did hit his knee when he fell. (Tr. 55).

Claimant testified that he has never sued anyone before and has never filed a worker's compensation claim other than this one. (Tr. 34). Before the injury in question, he never had any injury to his knee and his knee did not cause him problems at work. (Tr. 34). Before Claimant was injured, he did not know that he had a lesion in his femur or that he had arthritis in his knee. (Tr. 34). He has never received any compensation payments from Employer. (Tr. 45). Claimant testified that his job with Employer was a permanent position and that if he had not been injured, he would have remained at the job. (Tr. 75). He does not have the money to pay for either his pain medications or the surgery recommended by Dr. Meyer. (Tr. 99). Claimant continues to work for Terrebonne Parish as a truck driver, ten hours a day, four days a week. (Tr. 80). He does not have any physical difficulties with his current employment. (Tr. 80-81). Claimant's knee becomes swollen sometimes, particularly when the weather is bad or he stands for too long. (Tr. 86).

Testimony of Steve Smith

Mr. Smith is an occupation claims adjuster who assisted with the handling of Claimant's worker's compensation claim for Employer. (Tr. 106). Mr. Smith has met Claimant on one occasion. (Tr. 121). He has never examined Claimant's knee or talked to Dr. Meyer. (Tr. 128). In September 1999, he received a letter from Claimant's attorney asking him to authorize orthoscopic surgery for the Claimant. (Tr. 106-107). Mr. Smith denied the claim because Claimant had already chosen Dr. Davis as his physician and therefore no change of physician would be granted. (Tr. 107). Mr. Smith acknowledged that in his actual letter, he did not make reference to Dr. Davis but only to Dr. Sweeney as being Claimant's chosen physician. (Tr. 115-16). He did not have a referral order from Dr. Davis other than Dr. Davis' records. (Tr. 116-18). To Mr. Smith's knowledge, the insurance carrier has not paid any bills for Dr. Meyer's treatment of Claimant, although all bills for Dr. Davis and Dr. Sweeney have been paid. (Tr. 118). When asked who determines whether to approve a claimant's request for change of physician, Mr. Smith explained that it would be a claims manager with the insurance company, but numerous people are claims managers and there is no specific person assigned to a claimant's file. (Tr. 120-21).

Mr. Smith authorized surveillance of Claimant, which was subsequently conducted in late April and early May 2002. (Tr. 111-12; EX. 4). He was not sure if he had used the same surveillance company before, and he did not meet the actual investigator. (Tr. 125-26). The surveillance company was recommended by someone who worked for Employer. (Tr. 126-27). Mr. Smith did not know whether the investigator in Claimant's case had any police or detective experience. (Tr. 127). The investigators were instructed to monitor Claimant's activities. (Tr. 123). Mr. Smith explained that the insurance company writes the check to pay for surveillance but that he does not specifically recall how much it cost in this case. (Tr. 123). He guessed that the amount was $750. (Tr. 123). After Mr. Smith received the videotape of the surveillance and read the report, he mailed it to Employer and the insurance company. (Tr. 125).

Testimony of Faye Marie Brown

Ms. Brown is Claimant's fiancee. She reiterated her deposition testimony that Claimant used crutches for a couple of weeks after his accident. (Tr. 132). She explained that Claimant also limped for a couple of weeks after the accident, and at the present time, he limps when he has been standing for long periods of time or when he has been doing different activities. (Tr. 132-33). According to Ms. Brown, Claimant does not limp constantly. (Tr. 133). He complains of pain off and on, depending on what he has been doing on a particular day. (Tr. 133).

Testimony of Charles Lee Branch

Mr. Branch is employed by Insights Investigations. (Tr. 137). He has four years of experience in surveillance and has an investigator's license. (Tr. 139). As part of his employment, he and another investigator engaged in the surveillance of Claimant in May 2002. (Tr. 137-38). In addition to videotaping Claimant, he also prepared a report in conjunction with the surveillance. (Tr. 138).

Deposition of Robert Davis, M.D.

Dr. Davis practices occupational medicine. (JE-17, p. 5). Claimant was referred to Dr. Davis by Employer, which refers patients to him on a fee-for-service basis. (JE-17, p. 20). He first saw Claimant on January 8, 1999, the day after Claimant's accident. (JE-17, p. 6). Claimant presented with complaints of a twisting and popping noise in the left knee and a slight limp. (JE-17, p. 6). When Dr. Davis examined Claimant, he found some discomfort in the knee but no signs of external trauma. (JE-17, p. 6). The knee joint appeared to be stable but he suspected a possible problem in the cartilage of the knee. (JE-17, p. 6). Dr. Davis' impression was that Claimant had strained his knee and possibly had also sustained some damage to the cartilage on the inner parts of his knee. (JE-17, p. 6). He treated Claimant with an anti-inflammatory medication, cortisone shot and knee brace. (JE-17, pp. 6-7). The purpose of the knee brace was to immobilize the knee and allow the inflammation to subside. (JE-17, p. 6). Dr. Davis advised Claimant to restrict his duties at work and to avoid any climbing, kneeling or squatting for at least a week. (JE-17, p. 7).

Claimant returned a week later, on January 15, 1999, complaining of discomfort along the inner part of his knee. (JE-17, p. 8). He told Dr. Davis that he had not been wearing his knee brace. (JE-17, p. 8). Dr. Davis found that Claimant had some limitation in his range of motion but no signs of joint instability or swelling. (JE-17, p. 8). He suspected that Claimant had a strain, possibly of the medial collateral ligament (MCL), which is on the outer aspect of the knee. (JE-17, p. 8). Dr. Davis explained that sometimes it is hard to tell whether a person's knee pain is coming from the inside cartilage or the outside joint area. (JE-17, pp. 8-9). Once he decided that the MCL was the source of the pain, Dr. Davis prescribed a different anti-inflammatory medication for Claimant and told him to remain on light duty at work and return in a few days. (JE-17, p. 9). Dr. Davis testified that he would have explained to Claimant the importance of continuing to wear his knee brace during that time. (JE-17, p. 9).

Claimant returned to Dr. Davis on January 19, 1999, and reported some improvement in his condition. (JE-17, p. 9). However, he was still restricted in his range of motion and the pain appeared to be localized along the inner part of the knee. (JE-17, p. 9). Upon examination, Dr. Davis continued to believe that the injury was to the MCL. (JE-17, p. 10). Since Claimant was still having some pain and discomfort, Dr. Davis opted to have an MRI performed in order to take a closer look at the inner aspects of the knee joint. (JE-17, p. 10). He told Claimant to continue using the knee brace and the anti-inflammatory medication. (JE-17, p. 10). Dr. Davis also told Claimant that he should remain on light duty at work. (JE-17, p. 10).

The MRI was conducted on January 20, 1999. (JE-17, p. 11). It showed a slight bruising to the femur just above the knee. (JE-17, p. 12). In addition, there was a little fluid in one of the bursa, located on the top of the kneecap. (JE-17, p. 12). There were some degenerative/arthritic changes to the knee and some fluid surrounding the MCL. (JE-17, p. 12, 14). With regard to the cartilage of the knee, there was mucoid degeneration without a tear, which Dr. Davis said was important because it showed that the medial meniscus was not torn and that there was some prior degeneration present. (JE-17, p. 12). Dr. Davis explained that if there is a tear, physical therapy can

aggravate the patient's condition, and ruling out the tear helped him to assist Claimant in rehabilitating his knee. (JE-17, pp. 12-13). While the radiologist had said the MCL was intact, there was the possibility of a partial tear, which tends to heal without surgery. (JE-17, pp. 13-14). Dr. Davis testified that according to his records, the MRI results were also revealed to Claimant on January 21, and physical therapy was scheduled for the next day. (JE-17, p. 15).

Dr. Davis was not sure whether he saw Claimant on February 4, 1999, the day that Claimant was referred to Dr. Sweeney. (JE-17, pp. 14-15). He testified that sometimes he makes the referral to a specialist, and sometimes the employer makes the referral, and he does not remember whether he personally referred Claimant to Dr. Sweeney in this case. (JE-17, p. 17). In any case, it is not uncommon for Dr. Davis to make a referral after an MRI. (JE-17, p. 17). He said that sometimes the referral is due to the seriousness of the injury, and sometimes the referral is intended simply to give the patient peace of mind and reassurance. (JE-17, pp. 17-18). Dr. Davis said that based on Claimant's MRI, he probably made the referral because Claimant was still experiencing discomfort or needed some reassurance, not because he needed surgery. (JE-17, p. 18).

Dr. Davis testified that although he is not an orthopedic specialist, he has experience in dealing with knee injuries and he felt "quite comfortable in managing the case." (JE-17, p. 22). He explained that degenerative changes, such as the ones in Claimant's knee, occur over a long period of time, rather than as a result of a specific trauma event. (JE-17, p. 23). Claimant was forty-nine when Dr. Davis saw him, and degenerative changes at that age are not uncommon, particularly in the oil and gas and shipbuilding industries. (JE-17, pp. 22-23). These types of problems are usually treated with physical therapy and patient education regarding lifestyle changes and proper techniques for lifting, climbing and walking. (JE-17, p. 23). Degenerative changes cannot be reversed, but they can be managed so that the patient can have a fairly normal lifestyle. (JE-17, p. 23). Dr. Davis believed that physical therapy would help Claimant given the nature of his condition. (JE-17, p. 24). He did not know whether Claimant had undergone physical therapy or not. (JE-17, p. 24).

Deposition of John P. Sweeney, M.D.

Dr. Sweeney is an orthopedic surgeon. (JE-16, p. 5). He first saw Claimant on February 4, 1999, on a referral from Dr. Davis. (JE-16, p. 6). When Dr. Sweeney examined Claimant, he had the benefit of a file which included X-rays taken by Dr. Davis, the MRI scan and the results of his physical therapy appointments, along with all the other information that Dr. Davis had in the medical record. (JE-16, p. 7). By Dr. Sweeney's account, Claimant had not been compliant with physical therapy and was experiencing pain in his knee. (JE-16, p. 8). According to Dr. Sweeney's notes, Claimant had quadriceps atrophy and some slight tenderness around the MCL area, but he did not find any instability on Claimant's knee. (JE-16, p. 8).

Dr. Sweeney explained that the MCL is located on the inside of the knee and is a hinged structure that keeps the femur and tibia bones from moving abnormally. (JE-16, pp. 8-9). Claimant's MCL was tender around the femur but was not elongated, unstable or torn. (JE-16, p. 9). Dr. Sweeney testified that Claimant's pain was localized in that area of his knee, and he diagnosed

Claimant with a knee ligament sprain with weakness. (JE-16, pp. 9-10). Dr. Sweeney noted that although this was Claimant's main problem, the MRI also showed some pre-existing osteochondritis, some pre-existing wear and tear under the knee cap and a bone contusion. (JE-16, p. 10). Dr. Sweeney did not think that Claimant was too young to have wear and tear on his knee, which is commonly seen in people who are in their mid- to late-forties. (JE-16, p. 30). He explained that while this condition would not necessarily be aggravated by a later injury, it could prolong the recovery process. (JE-17, pp. 31-32). With regard to the osteochondritis, Dr. Sweeney testified that it is a problem that "develops usually in the teenage years with a small island of bone that becomes different in its appearance from the bed of bone where it came from" and is possibly caused by a vascular injury to the bone. (JE-16, p. 11). While this condition can sometimes result in a complete detachment, Claimant's osteochondritis was "an incidental finding." (JE-16, p. 11). Dr. Sweeney found no evidence that Claimant's osteochondritis was causing his symptoms of pain. (JE-16, pp. 11-12).

Claimant and the doctor had a discussion about physical therapy and how Dr. Sweeney felt that Claimant should approach it. (JE-16, p. 9). With an injury like Claimant's, physical therapy is the treatment for strengthening, and Dr. Sweeney believed that Claimant needed to take therapy more seriously. (JE-16, pp. 9-10). Dr. Sweeney thought that if Claimant was compliant with his therapy, he would make a full recovery. (JE-16, p. 10). Claimant agreed to return to therapy and cooperate in his treatment. (JE-16, p. 12).

Claimant returned to see Dr. Sweeney on February 23, 1999, complaining of mild to moderate pain. (JE-16, p. 12, 24). Dr. Sweeney noted that, given the nature of Claimant's injury, it was unusual that he was still hurting. (JE-16, pp. 24-25). According to Dr. Sweeney, Claimant had attended physical therapy but had missed one session. (JE-16, pp. 12-13). Dr. Sweeney did not know the reason for this noncompliance but again suggested that Claimant did not take the therapy very seriously. (JE-16, p. 12). Nevertheless, Claimant was doing well, and the physical therapist reported that he had achieved full range of motion in both flexion and extension. (JE-16, p. 13). Claimant had strength approaching normal and had shown moderate improvement and an increase in functional activity over his last several physical therapy visits. (JE-16, p. 13).

During the exam, Dr. Sweeney found no effusion or fluid in Claimant's knee, and Claimant's ligaments were tight, which is normal. (JE-16, p. 13). Although Claimant said he still had pain in his knee, he had no mechanical symptoms such as clicking or locking of the knee. (JE-16, p. 13). Dr. Sweeney explained that since Claimant had no mechanical symptoms during this second visit, he could rule out osteochondritis as the problem. (JE-16, p. 14). He thought Claimant's pain was more likely the result of the strained MCL, and it was "pretty clear" that Claimant did not have any sort of tear in his ligament. (JE-16, p. 24, 26). Dr. Sweeney testified that most patients with this type of injury heal in about six to eight weeks. (JE-16, p. 29). Dr. Sweeney concluded that Claimant had reached maximum medical improvement (MMI) and had improved enough to be able to return to his job. (JE-16, pp. 13-14). He anticipated that Claimant's strength would continue to return and planned to re-evaluate Claimant on an as-needed basis. (JE-16, pp. 13-14, 26-27). In Dr. Sweeney's opinion, Claimant's condition did not warrant an impairment rating. (JE-16, pp. 14-15).

Claimant did not contact Dr. Sweeney again for another appointment after that visit. (JE-16, p. 27). Dr. Sweeney testified that he did not know whether he would have recommended further diagnostics
if Claimant had returned later with complaints of pain. (JE-16, pp. 27-28). He said it would depend on the big picture, rather than merely on Claimant's subjective pain complaints. (JE-16, p. 28). Dr. Sweeney agreed it would be possible that he would recommend further diagnostics, but in any case, he would re-evaluate Claimant and treat him in an appropriate fashion. (JE-17, p. 28).

Dr. Sweeney did not see Claimant again until August 16, 2001. (JE-16, p. 15). Claimant told Dr. Sweeney that he was unable to work and the only thing he could physically do was to occasionally go on a bike ride. (JE-16, p. 16). Claimant said that he was limping constantly and that his knee was swollen. (JE-16, p. 16). He also stated that he had been "continuously uncomfortable" since his last visit and was now being treated by Dr. Meyer, another orthopedic specialist. (JE-16, p. 15). Dr. Meyer had recommended that Claimant undergo an arthroscopy because of the constant pain in his knee and was prescribing narcotic medication for Claimant's pain. (JE-16, pp. 15-16). According to Claimant, Dr. Meyer wanted to look inside his knee and see where he was still hurting. (JE-16, p. 20). Dr. Sweeney agreed that this procedure is commonly done but that most of the time, there are physical findings or MRIs that correlate to the patient's complaints. (JE-16, pp. 20-21).

Upon examination, Dr. Sweeney noted that Claimant had symmetry in his thighs and calves. (JE-16, p. 16). The purpose of this measurement was to ascertain whether there was any swelling or any atrophy or loss of muscle bulk that might be symptomatic of a chronically underused joint or muscle injury. (JE-16, p. 17). Since there was symmetry in Claimant's thighs and calves, Dr. Sweeney found no evidence of atrophy. (JE-16, p. 17). Dr. Sweeney would have expected to see some evidence of atrophy or swelling if Claimant had been having a constant problem with his knee. (JE-16, p. 17). Instead, he found no evidence of swelling or fluid in Claimant's knee, and Claimant's ligaments were intact. (JE-16, p. 17). Dr. Sweeney observed that Claimant walked without an antalgic gait or limp. (JE-16, pp. 18-19). There was no evidence that Claimant was having any mechanical problems such as locking or catching in the knee. (JE-16, pp. 18-19).

In Dr. Sweeney's opinion, Claimant did not need surgery. (JE-16, p. 20). Dr. Sweeney believed that Claimant's primary injury, a sprain to the MCL, had already healed. (JE-16, p. 20).

Deposition of Richard Meyer, M.D.

Dr. Meyer began treating Claimant on March 17, 1999. (JE-18, p. 8). Claimant told Dr. Meyer that he had been treated by Dr. Sweeney, but Dr. Meyer did not recall Claimant saying that he had been discharged by Dr. Sweeney or that Dr. Sweeney had nothing else to offer him. (JE-18, p. 30). Although he did not have access to Claimant's prior medical records at that time, he later received some records from Dr. Davis and Dr. Sweeney and reviewed them. (JE-18, p. 8). He noted that their findings regarding Claimant's MCL injury were consistent with his own diagnosis, and the physical exams, radiographs and MRI were also consistent with this diagnosis. (JE-18, p. 8). In addition, Dr. Meyer felt that the treatments rendered by both Dr. Davis and Dr. Sweeney in terms of

physical therapy and medication were reasonable for such an injury. (JE-18, p. 8). On Claimant's first visit, Dr. Meyer gave him a cortisone shot and recommended that he avoid repetitive bending, stooping or climbing. (JE-18, p. 30). Dr. Meyer testified that he would not have recommended for Claimant to return to duty as a pipefitter at that time. (JE-18, p. 30).

When asked why Claimant did not complain of pain in an area in which the MRI showed a bone contusion, Dr. Meyer explained that whenever a person has trauma to the knee, he or she usually will be more symptomatic in one area. (JE-18, p. 9). Dr. Meyer also discussed the osteochondral defect that appeared on Claimant's MRI which suggested that Claimant has sustained an injury to his bone and cartilage in the femur area, resulting in a lesion or trauma to the surface of the bone, which may be related to a specific trauma event or may have been a pre-existing condition. (JE-18, pp. 10-11). Dr. Meyer testified that this finding might be consistent with Claimant's complaints of pain but it is impossible to say whether or not it is pre-existing. (JE-18, p. 11). The MRI also showed some pre-existing arthritis, but according to Dr. Meyer, that does not necessarily mean that the osteochondral defect was also pre-existing. (JE-18, p. 11). He agreed that Claimant's pain was concentrated in the MCL area and that there was no evidence of a meniscal tear. (JE-18, pp. 12-13). Dr. Meyer pointed out, however, that sometimes a tear may be present even if it does not show up on a test such as the McMurray test. (JE-18, p. 13).

Dr. Meyer acknowledged that there was no instability in Claimant's knee but said that knee stability does not have anything to do with whether or not someone has a torn meniscus. (JE-18, p. 14). The lack of redness or bruising also does not rule out a meniscal tear. (JE-18, p. 15). If a patient's knee cracks when he or she is going down stairs or there is swelling in the knee, the patient may be exhibiting signs of a meniscal tear, but these symptoms are also associated with degenerative arthritis. (JE-18, p. 15). A person need not undergo a major traumatic event in order to tear the meniscus. (JE-18, p. 15).

In discussing Claimant's physical therapy, Dr. Meyer said that the use of a knee brace would have been irrelevant to his treatment because of the nature of the injury. (JE-18, p. 16). He speculated that if Claimant had been more diligent with the therapy, he might have strengthened his knee and rehabilitated it sooner. (JE-18, p. 16). Dr. Meyer never recommended physical therapy for Claimant, although he did recommend exercises. (JE-18, p. 17). He testified that he would have prescribed more therapy for Claimant had he known that Claimant had only attended therapy for two weeks, as opposed to six weeks, as Claimant had told him. (JE-18, p. 17).

Dr. Meyer believed that Claimant could return to light duty work, and he was aware that Claimant did eventually return to work as a truck driver. (JE-18, pp. 17-18). He did not know whether the truck driving gave Claimant problems but reported that Claimant said he suffers from pain on a daily basis for which he sometimes takes pain medication. (JE-18, p. 18). He agreed that based on the physical therapist's report of Claimant's progress in the weeks following his injury, there was "not a lot of reason to suspect that [Claimant] couldn't return to work." (JE-18, p. 18). According to Dr. Meyer, even if there is no objective evidence of a patient's pain, that is not necessarily a reason to discount the patient's subjective complaints of pain. (JE-18, p. 19).

Dr. Meyer testified that the MCL injury may not be the reason that Claimant was unable to return to work at his old job. (JE-18, p. 20). When told that Dr. Sweeney had determined that the MCL was fully healed in August 2001, Dr. Meyer agreed that the damage should have been healed by that point. (JE-18, pp. 39-40). He suggested that Claimant's pain is the result of osteoarthritic changes, which may or may not be work-related. (JE-18, p. 20). In July 1999, he first recommended arthroscopic surgery for Claimant to address his subjective complaints of pain which he believes are connected to osteoarthritis. (JE-18, p. 21). In the course of his treatment with Dr. Meyer, Claimant has not really had any change in his condition, at least in terms of his subjective complaints of pain. (JE-18, pp. 23-24, 30-35). Although Claimant often complained of swelling in his knee, Dr. Meyer only detected swelling on one visit, in April 2000. (JE-18, pp. 40-41). Dr. Meyer does not remember ever seeing Claimant limp but said someone with Claimant's knee problems would not necessarily limp. (JE-18, pp. 41-42).

From a causation standpoint, Dr. Meyer believes that the MCL injury probably exacerbated Claimant's pre-existing osteoarthritic condition. (JE-18, p. 27). He explained that trauma to the knee can cause additional degenerative changes, which in turn make it more difficult for a person to recover from the traumatic injury itself. (JE-18, p. 27). In terms of restrictions, Dr. Meyer recommended that Claimant avoid repetitive bending, stooping, crawling or climbing as long as he is asymptomatic. (JE-18, p. 28). In his opinion, Claimant should be restricted to light duty work, avoid lifting more than fifteen pounds and do as much walking or sitting as necessary but alternate positions if need be. (JE-18, pp. 28-29). Dr. Meyer believes it would be very difficult for Claimant to return to his job as a pipefitter right now, although he might be able to return to that type of work if the surgery is successful. (JE-18, p. 29). If Claimant does not have the surgery, his osteoarthritic condition will continue to cause him problems. (JE-18, p. 35).

Dr. Meyer last saw Claimant in March 2002. (JE-18, p. 28). He has not assigned a disability rating to Claimant. (JE-18, p. 25). In the past three years, Dr. Meyer has treated Claimant with medication and recommended home exercises. (JE-18, pp. 20-21). The only other treatment besides surgery that Dr. Meyer would recommend is a subsequent series of injections to replace the joint fluid in Claimant's knee, if necessary. (JE-18, p. 25). Dr. Meyer agreed that his recommendation for surgery is based upon the credibility that he has given to Claimant's subjective complaints of pain. (JE-18, p. 37).

Summary of Surveillance, Insight Investigations

In late April and early May 2002, two investigators conducted surveillance of Claimant. (EXs. 3, 4). On May 7, they videotaped Claimant at his home conducting an unidentified task next to his truck and then driving away. (EX. 4, p. 2). They also videotaped Claimant arriving at work and walking across the parking lot and later getting into a dump truck and driving away. (EX 4, p. 3). Claimant then went to a gas station to buy a snack and got back into the truck and drove away. (EX. 4, p. 3). He then got out of the truck and talked with another man. (EX. 4, p. 3). He was observed bending at the waist to remove an orange cone from a job site. (EX. 4, p. 3). Claimant was also observed directing traffic, talking with other workers, walking around the area and leaning on his truck. (EX. 4, p. 4). He was observed bending at the waist to place a large pole on the ground

and to move more orange cones. (EX. 4, p. 4). Claimant was seen sitting down and putting his hands on his knees while leaning forward. (EX. 4, p. 4).

On May 8, the investigators again observed Claimant leaving home and going to work. (EX. 4, p. 5). He then was observed driving his truck and walking around a work site. (EX. 4, p. 6). Claimant was seen lifting a large pole and a piece of unidentified surveying equipment. (EX. 4, p. 7). He was also observed leaving work and arriving home. (EX. 4, pp. 7-8). On May 9, Claimant was observed leaving his home and arriving at work, getting into the dump truck and driving away. (EX. 4, p. 8).

IV. DISCUSSION

Credibility

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Assn., Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

In this case, the record is riddled with inconsistencies between Claimant's hearing testimony, his deposition and the medical records of the doctors who have treated him for his injury. For example, at various times, Claimant made disparate statements to Dr. Meyer and Dr. Sweeney regarding his employment status, claiming that he was unable to return to work when in fact he was working at the time. Moreover, while Claimant testified that he has limped continuously since his accident, neither Dr. Sweeney nor Dr. Meyer ever observed him limping. The video shows a remarkably healthy man. Claimant does not limp and moves about without caution or favoring his injured leg. In addition to these inconsistencies, Claimant has also admitted to claiming other people's children as dependents on his tax returns despite the fact that he was not financially responsible for these children at the time. For these reasons, I give less credibility than I otherwise would to Claimant's testimony and his subjective complaints of pain.

Nature and Extent

In this case, the Parties agree that Claimant had a workplace accident and that he sustained a knee injury as a result, and therefore, causation is not at issue. The main source of disagreement between the Parties is over whether or not Claimant continues to suffer from this injury.

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

In this case, Dr. Sweeney, an orthopedic specialist who examined Claimant twice in the weeks following his accident, found that Claimant's MCL injury had healed about six weeks after the accident. Claimant had achieved full range of motion in physical therapy and had no swelling in his knee. His ligaments were tight and he had no mechanical symptoms such as locking or popping in his knee. Dr. Sweeney had the benefit of Dr. Davis' records, the x-rays and MRI. Based on this information, Dr. Sweeney found that Claimant had reached MMI and released him to full duty on February 23, 1999. Dr. Meyer noted that Dr. Sweeney's findings regarding the MCL injury was consistent with his diagnosis, the physical exams, x-rays and MRI. Dr. Meyer appears to have formed his opinion that Claimant might need more treatment based on Claimant's subjective complaints while ignoring the objective evidence. As I discussed earlier, I do not give the full weight of credibility to Claimant's subjective complaints of pain following his release by Dr. Sweeney. Accordingly, I find that Claimant reached MMI on February 23, 1999.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans

(Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Claimant in this case was released to full duty by Dr. Sweeney and should have been able to return to full duty in February 1999. Although Claimant testified that he was unable to return to full duty, he also admitted that he did not know exactly what he would be asked to do and that he never inquired whether it would be possible for him to remain at his light duty job after reaching MMI. Instead, Claimant simply stopped going to work and was fired as a result. While Dr. Meyer placed restrictions on Claimant when he first treated Claimant in March 1999, at this time Dr. Meyer did not have access to Claimant's prior medical records, the x-rays or the MRI. Because I believe that Claimant was physically capable of returning to his previous job when Dr. Sweeney released him, I find that Claimant suffered no loss of wage-earning capacity as a result of his workplace accident.

Claimant has failed to persuade the Court that he was unable to return to his former employment. Consequently, I find that there was no need for Employer to show the existence of suitable alternative employment.

Choice of Physician

Section 7(c)(2) of the Act provides that when the employer or carrier learns of an employee's injury, either through written notice or as otherwise provided by the Act, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or deputy commissioner. See 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. Lloyd, 725 F.2d at 787, 16 BRBS at 53 (CRT); Swain, 14 BRBS at 664; Washington v. Cooper Stevedoring Co., 3 BRBS 474 (1976), aff'd, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); Buckhaults v. Shippers Stevedore Co., 2 BRBS 277 (1975).

There is no question that Dr. Davis was properly authorized to be Claimant's chosen physician. In this case, Claimant signed a choice of physician form designating Dr. Davis as his treating physician. Claimant has testified that he knew and understood what he was signing and that he freely chose Dr. Davis to treat him. Claimant attacks the treatment of Dr. Sweeney on two separate grounds in order to argue that Employer should have authorized the change of physician to Dr. Meyer. First, Claimant argues that his failure to obtain authorization for Dr. Meyer's treatment should be excused because Dr. Sweeney discharged him from care. Second, he argues that he never chose Dr. Sweeney as his treating orthopedic specialist and therefore he was entitled to see Dr. Meyer instead.

According to Claimant, Dr. Sweeney discharged him from care even though he still complained of pain, and for that reason, Claimant should have been able to switch to another orthopedic specialist in order to receive the proper care. However, Claimant's argument rests on the notion that by releasing him to full duty, Dr. Sweeney was, in effect, discharging him completely from all future care. On the contrary, according to Dr. Sweeney's testimony, Claimant was never told that he was discharged, and Dr. Sweeney was willing to see him again if he needed further treatment once he had reached MMI. Claimant made the decision not to return to see Dr. Sweeney, presumably because he did not agree with Dr. Sweeney's assessment. While every patient has a right to seek a second opinion, a claimant may not necessarily exercise this right at the expense of the employer. I find that Dr. Sweeney never effectively refused treatment to Claimant. Consequently, Employer was not required to authorize a change of physician from Dr. Sweeney to Dr. Meyer.

Consent to change physicians shall be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Maguire v. Todd Pac. Shipyards Corp., 25 BRBS 299, 301-02; Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). The regulation only states that an employer *may* authorize a change for good cause; it is not required to authorize a change for this reason. Swain, 14 BRBS at 665. If a claimant's initially chosen physician provides him with the care of a specialist, the employer is no longer required to consent to a change in physicians to another specialist. Senegal v. Strachan Shipping Co., 21 BRBS 8 (1988).

Claimant argues that he did not choose Dr. Sweeney, to whom he was referred by Dr. Davis, to be his treating orthopedic specialist. Claimant therefore reasons that his request to change physicians to Dr. Meyer should have been granted and that Employer should have paid for the subsequent medical expenses incurred. However, by designating Dr. Davis as his chosen physician, Claimant implicitly agreed that Dr. Davis could refer him to a specialist if necessary as part of his proper care and treatment of the knee injury. At that point, Employer was no longer obliged to consent to an change of physician from Dr. Sweeney to another specialist.

The evidence in this case fails to support either of Claimant's arguments as to why Employer should have authorized Dr. Meyer's treatment of him. Accordingly, I find that Claimant is not entitled to an authorization for a change of physician.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

Claimant's claim for benefits under the Act is hereby **DENIED**.

ORDERED this 15th day of November, 2002, at Metairie, Louisiana.

A

LARRY W. PRICE
Administrative Law Judge

LWP:bab